

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

UNITED STATES OF AMERICA)
)
 -versus-)
)
 RONALD A. MCIVER) 8:04-745
)
 Defendant) 10/06/2010
)
) Spartanburg, SC
)
 _____)

SENTENCING

BEFORE THE HONORABLE HENRY F. FLOYD
UNITED STATES DISTRICT JUDGE, presiding

A P P E A R A N C E S:

For the Government: WILLIAM J. WATKINS, JR., AUSA
U.S. Attorney's Office
105 N. Spring Street
Greenville, SC 29601

For the Defendant: PETER R. ZEIDENBERG, ESQ.
MITKA T. BAKER, ESQ.
DLA Piper US LLP
5000 8th Street, NW
Washington, DC 20004

STEVEN E. BUCKINGHAM, ESQ.
Nelson Mullins riley Scarborough
104 South Main Street
Greenville, Sc 29601

Court Reporter: Jean L. Cole, RMR
U.S. District Court Reporter
PO Box 10732
Greenville, SC 29603

The proceedings were taken by mechanical stenography and the transcript produced by computer.

1 THE COURT: Mr. Watkins.

2 MR. WATKINS: Good afternoon, your Honor.

3 THE COURT: Ready to proceed?

4 MR. WATKINS: Government is ready, sir.

5 THE COURT: All right. Mr. Zeidenberg, you ready?

6 MR. ZEIDENBERG: Good afternoon, your Honor. Yes, we
7 are.

8 THE COURT: All right. Does he want to remain seated
9 or can he come up here and stand?

10 MR. ZEIDENBERG: I'm sorry?

11 THE COURT: Does he want to remain seated over there
12 or does he want to come up here and stand?

13 MR. ZEIDENBERG: Yes, your Honor.

14 THE COURT: Which one?

15 MR. ZEIDENBERG: I'm sorry. Seated. Remain seated.

16 THE COURT: All right. You need to put the mic over
17 there where he. . .

18 All right. Mr. McIver, have you had an opportunity
19 to go over the presentence report with your lawyers?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Other than the objection do you have any
22 question about it?

23 THE DEFENDANT: No, sir.

24 THE COURT: Mr. Zeidenberg, have you -- you've
25 obviously read the report and discussed it with your client?

1 MR. ZEIDENBERG: Yes, your Honor.

2 THE COURT: Mr. McIver, when you started out, as of
3 now as a result of the 2255 the statutory provisions call for
4 as to counts 1, 3, 4, 5, 13, 14 and 15, 20 years on each count;
5 supervised release on counts 1, 3, 4, 5, 13, 14 and 15 at least
6 two years, but not more than three years for each count; not
7 eligible for probation. The fine on each of those counts is
8 one million dollars each for a total of seven million dollars,
9 special assessment \$100 for each count for a total of \$700.

10 When they did the guideline provisions, your total
11 offense level came back at 32, your criminal history
12 category I, ineligible for probation, an advisory guideline
13 range of 121 to 151 months, three years supervised release.
14 Fine and restitution were either not calculated or not
15 applicable and a \$700 special assessment fee.

16 Do you understand that's what the --

17 THE DEFENDANT: Yes, sir.

18 THE COURT: -- guidelines call for?

19 There was an objection by the defense, but none by
20 the government. Mr. Zeidenberg, I'll be glad to hear from you
21 on your objection.

22 MR. ZEIDENBERG: Thank you, your Honor. Your Honor,
23 the government submitted in their verdict form drug weights for
24 the jury to make specific findings and on the counts for which
25 there were convictions we've -- it's not controversial and not

1 controverted how that calculation is done. You take the
2 weights that are found by the jury and multiply them as
3 designated by the sentencing guidelines and when you do that,
4 you come up with a level 26 once you convert everything to
5 marijuana.

6 Now, the presentence report writer did a different
7 calculation. He calculated the entire weight of the pill for
8 the non-oxycodone drugs, but there is no evidence of how he
9 calculated that. In his letter responding to the government --
10 I'm sorry, responding to the defense's objections, the
11 probation -- the presentence report writer says that he will
12 file detailed findings outlining how he came to those
13 calculations. He hasn't done that.

14 He alludes in his response that he had some
15 conversations with the prosecutor and a case agent. We don't
16 know anything about those conversations, your Honor. We don't
17 know what was said. We don't know what he's relying on. There
18 are no lab reports that have been provided to us. There are no
19 notes. There's no lab notes. There is simply no evidence by
20 which your Honor can find, as you must, by a preponderance of
21 the evidence that these drug weights that the presentence
22 report writer indicates are appropriate are -- there's any
23 basis for them. So I don't think the court has any alternative
24 but to find the weights as found by the jury, because that's
25 the only thing that's the only evidence that's before the

1 court.

2 THE COURT: Mr. Watkins.

3 MR. WATKINS: May it please the court, your Honor.

4 The government disagrees with the defense's proposed
5 calculation for the following reasons: First, and I think the
6 presentence writer, Mr. Wood, laid this out clearly, but for --
7 according to the guidelines and according to the cases for
8 oxycodone you take the actual amount of that drug in the pill,
9 not the entire weight of the pill. That is laid out in the
10 guidelines. For the other substances at issue in this case,
11 for example, morphine Dilaudid, the guidelines are clear that
12 you treat that as a mixture and for the -- for calculation
13 purposes you take the weight of the entire pill, not the amount
14 of the drug within the pill.

15 And, your Honor, I would like to hand up to the
16 court, and I have a copy for opposing counsel, two cases that
17 really lay this out clearly, one from our own Fourth Circuit
18 Court of Appeals and another from the Ninth Circuit Court of
19 appeals that have rejected arguments that are being made in
20 this court today.

21 In those two cases I'm handing up the issue was
22 specifically Dilaudid, which was just one of the substances at
23 issue in this case, but the guidelines clearly provide -- and
24 I'm looking -- beg the court's indulgence, note (a) under
25 2D1.1, "Unless otherwise specified the weight of a controlled

1 substance set forth in the table refers to the entire weight of
2 any mixture or substance containing a detectable amount of the
3 controlled substance."

4 But under the definitions under Section (b) the term
5 "oxycodone actual" refers to the weight of the controlled
6 substance itself contained in the pill or capsule, so oxycodone
7 is treated differently than the other substances. That's what
8 the guideline provides for.

9 As for where the probation officer came up with the
10 weights, I believe the court would ask him or we can put the
11 case agent up, that the pill weights came from a DEA index
12 where obviously the DEA regulates drug manufacturers of
13 controlled substances in the United States. They periodically
14 receive actual pills, dosage units from those manufacturers,
15 regulate them, review them, weigh them and that's where the
16 weights came from.

17 And I'm also informed from the case agent and I would
18 be happy to call him, that whenever there was an issue, for
19 example, if -- could say a generic could have been prescribed
20 and we don't know the exact weight of the pill, the number used
21 was the lowest possible weight of any pill of that type.
22 Therefore, your Honor, the government believes that in
23 accordance with the case law, the guidelines, that the drug
24 amount is properly calculated and is accurate and your Honor
25 should so find by the appropriate standard.

ADAM ROBERSON - DIRECT

7

1 THE COURT: I think you better take some testimony.

2 MR. WATKINS: Yes, sir. All right. Your Honor, I
3 would be happy to call first Agent Roberson.

4 Adam ROBERSON, Government's witness, sworn

5 DIRECT EXAMINATION BY MR. WATKINS

6 Q. Please state your full name for the record.

7 A. My name is Adam Roberson.

8 Q. Agent Roberson, where do you work?

9 A. I'm a diversion investigator. I work for the Drug
10 Enforcement Administration in Columbia, South Carolina. I'm
11 the senior investigator for the state.

12 Q. How long have you been with DEA?

13 A. I've been with DEA for 11 years as a diversion
14 investigator. I was a police officer in South Carolina for 11
15 years prior to that, totalling 22 years in law enforcement.

16 Q. Okay. Are you familiar with the DEA logo index?

17 A. I am. Part of my responsibilities as a diversion
18 investigator in addition to enforcing the Controlled Substance
19 Act as it relates to the diversion of legitimate
20 pharmaceuticals is to regulate and inspect manufacturers and
21 handlers of those drugs. In the case on point here
22 manufacturers of controlled substances in this state and abroad
23 throughout the U.S. are required when inspected by DEA to
24 provide ballistic samples of any controlled substance
25 manufactured through their licensure with DEA.

ADAM ROBERSON - DIRECT

8

1 Q. Now, what do you mean by ballistic samples?

2 A. We take samples of any run of any manufacturer of any
3 controlled substance. Those samples are recovered by diversion
4 investigators. They are transferred to our special testing
5 laboratory in Dulles, Virginia where they're maintained and
6 cataloged for inspection visual, compared to any clandestine
7 ones we may find on the street. They're also cataloged by
8 weight. Those weights and logos of what the pills look like
9 and have on the score are maintained in an index which is an
10 in-house computer systems used by diversion investigators to
11 identify pharmaceuticals. By doing so we have all controlled
12 substances legitimately manufactured in the U.S. in this index
13 by weight, color, size and shape.

14 Q. Okay. Explain to the court how you used this index and
15 what you did in assisting with the drug calculations in this
16 case.

17 A. In this case if a drug was noted in a prescription order
18 by Dr. McIver in a brand form, for instance in this case
19 OxyContin is a brand, very specific. It's a brand name of an
20 oxycodone product, but there's only one manufacturer of
21 OxyContin, then I take the name and the weight as prescribed,
22 the strength, for instance, OxyContin 80 milligram there's only
23 one manufacturer and one weight of the brand. I take that,
24 compare it to our logo index which has a ballistic weight of
25 that tablet as provided by the manufacturer to be within their

ADAM ROBERSON - DIRECT

9

1 parameters.

2 Also methadone, Dilaudid, in this case we got
3 morphine sulphate, MSIR. There are other different
4 manufacturers of morphine sulphate, so in this case because
5 there are multiple ballistic samples and there are other types
6 of generics, because I don't know, nor does the defendant know
7 how the pharmacy may have filled that prescription, I was
8 required to take the lowest recorded U.S. manufactured drug
9 weight for that type of a drug. So in this case in that regard
10 morphine sulphate was a 100 milligram tablet. Although there
11 are much bigger ones I used lowest possible recorded weight in
12 the U.S.

13 Q. Do I understand you for a drug containing morphine
14 sulphate you used the lowest possible total weight a tablet
15 could be with that milligram dosage?

16 A. Yes, sir.

17 Q. And did you repeat that process for other controlled
18 substances at issue where you did not know what exactly the
19 pharmacy had dispensed insofar as the brand?

20 A. In this case unless it was a brand any generic -- and
21 most of the drugs in this case were brand, they were written
22 for Roxicodone, which is a brand of oxycodone or OxyContin,
23 which is a brand for oxycodone, but if there was a generic on
24 the prescription, I used the lowest possible calculated
25 recorded weight in our inventory.

ADAM ROBERSON - DIRECT

10

1 Q. Okay. And you -- where did you get the milligram weights
2 from in your research to then go look in the DEA logo index?

3 A. Based on the documents provided in the case recovered
4 through search warrants or prescriptions, so if the
5 prescription written by Dr. McIver to a patient for MSIR
6 15 milligrams or whatever the drug may be, I would take the
7 drug, morphine sulphate 15-milligram strength, and I'd look in
8 that logo index for the lightest weight because there are
9 options, so I took the lightest weight based on his handwritten
10 order of what the minimal would be, minimal weight of morphine.

11 Q. And did you provide these weights to the United States
12 probation officer?

13 A. I did. It's common practice in a case like this for us
14 to confer with probation and I did speak with Mr. Woods in this
15 case related to exactly what we're talking about, the weights
16 of the tablets and how they applied in this case.

17 Q. Did you receive any calls from defense counsel regarding
18 weights?

19 A. Not at all.

20 Q. Would you have answered their questions had they called
21 you?

22 A. Absolutely. Commonly happens in cases like this.

23 Q. Okay. Are you familiar with the calculation of drug
24 amounts once the weight of the pill is determined?

25 A. I am.

ADAM ROBERSON - DIRECT

11

1 Q. And could you explain your understanding of that based on
2 your experience.

3 A. In this case there's two categories of drugs, oxycodone
4 products and then all the other controlled substances as it
5 relates to this case. In relation to oxycodone products the
6 Sentencing Guideline 2D1.1 require that it's an actual weight,
7 so an OxyContin 80-milligram tablet we only use 80 milligrams.
8 The actual active ingredient in the tablet is converted to an
9 equivalent of marijuana pursuant to the guidelines. One gram
10 of active ingredient oxycodone equals 6,700 grams of marijuana.
11 I assisted in mathematical calculation of oxycodone to
12 marijuana for probation.

13 With all the other drugs it's the physical weight of
14 the tablet based on the logo index we've spoken of. I tallied
15 up all the numbers of tablets as written by Dr. McIver in the
16 counts in the indictment. I totaled up those weights of how
17 much marijuana equivalent each tablet in its total weight and I
18 provided that also to probation office.

19 Q. Okay. And you spoke multiple times with the probation
20 office and answered any questions?

21 A. In this case I did and on other cases out of Greenville
22 I've talked on many occasions on this topic.

23 Q. Okay. And the drug amounts used in this case that
24 represent the current guideline range are just those in the
25 substantive counts of the indictment, correct?

ADAM ROBERSON - CROSS

12

1 A. Excluding count one it's substantive counts as convicted
2 on the jury verdict form, yes, sir.

3 Q. And it excludes the drug amounts related to substantive
4 counts of Mr. Shealy, correct?

5 A. No. Mr. Shealy's drug amounts were included because my
6 understanding was that the charge related to the death of Mr.
7 Shealy was out, but the drug weights were still a conviction.
8 I may be incorrect.

9 Q. That's what you calculated, right?

10 A. Yes, sir.

11 Q. But you're not aware -- you're not aware that the
12 probation officer excluded the Shealy weights even though the
13 court just reversed on the death issue?

14 A. I'm familiar with what the Shealy weights were. If the
15 Shealy weights are included the guideline range will not
16 change.

17 MR. WATKINS: Okay. Please answer any questions of
18 the court --

19 THE COURT: Cross-examination.

20 MR. WATKINS: -- or the defense.

21 CROSS EXAMINATION BY MR. ZEIDENBURG

22 Q. Good afternoon.

23 A. Sir.

24 Q. Were you the case agent on the case --

25 A. Yes.

ADAM ROBERSON - CROSS

13

1 Q. -- against Dr. McIver?

2 A. Yes.

3 Q. And these calculations that you did, when did you do
4 them?

5 A. I did them at my office, as I do when we get to the
6 sentencing phase of a case.

7 Q. So when did you do these calculations you're referring
8 to?

9 A. When?

10 Q. When did you do these calculations. When?

11 A. Prior to sentencing of Dr. McIver when he was sentenced
12 sometime ago, and I've done them again since.

13 Q. Okay. And do you have those calculations with you?

14 A. They're sitting on the table, yes, sir.

15 MR. ZEIDENBERG: Okay. And can I get a copy, your
16 Honor?

17 THE COURT: Sure.

18 MR. WATKINS: No objection from the government.

19 THE COURT: How long is it going to take to copy?

20 A. Pardon me.

21 THE COURT: How long does it take to copy?

22 A. It's only about five pages. I actually wrote my
23 calculations on the verdict form based on each count.

24 THE COURT: Okay.

25 MR. WATKINS: Could the witness step down here just

ADAM ROBERSON - CROSS

14

1 to make sure we're getting the correct materials to copy.

2 THE COURT: Sure.

3 MR. ZEIDENBERG: May I continue while we're waiting
4 your Honor?

5 THE COURT: Sir?

6 MR. ZEIDENBERG: May I continue?

7 THE COURT: Yes, sir.

8 BY MR. ZEIDENBERG:

9 Q. So you provided those actual records to probation?

10 A. No, sir.

11 Q. Did you provide it to the government?

12 A. I brought them with me today. Those are notes I made in
13 preparation for today.

14 Q. So no one's seen them?

15 A. Correct, I've spoken --

16 Q. I --

17 A. I'm sorry.

18 Q. Go ahead. I didn't mean to cut you off.

19 A. I've spoken with the prosecution and probation regarding
20 those numbers since I was notified of this sentencing
21 yesterday.

22 Q. So you just found out about the sentencing yesterday?

23 A. Yes, sir.

24 Q. You indicated that there's an index that you refer to?

25 A. Yes, sir. It's called the DEA logo index.

ADAM ROBERSON - CROSS

15

1 Q. And do you have that with you?

2 A. No, sir. It's a computerized system.

3 Q. So if we wanted, the defense wanted to check to see if
4 you were doing your calculations correctly, how would we do
5 that?

6 A. I would have been happy to sit down with you and show you
7 the logo index or also the manufacturers of these drugs have
8 ballistic samples and standard weights they could have provided
9 as well.

10 Q. And is there -- you ever provide your contact information
11 to the government -- I mean, to the defense?

12 A. Yes. I'm sure I was listed as a -- I testified in the
13 case. I would speculate my information was listed on the
14 witness list.

15 Q. You speculate that it was?

16 A. I know my name was listed with my address and contact,
17 yes, sir.

18 Q. And so all of the addition and multiplication and all the
19 mathematical equations that you did are in this paperwork
20 that's now being copied?

21 A. These are my rough notes, but, yes, sir, it's there.

22 MR. ZEIDENBURG: Well, your Honor, I don't have any
23 other questions of this witness. I obviously would like to see
24 the calculations. I mean, if I may, we can step down -- the
25 witness can step down if the court wishes. I just have

1 argument to make to you.

2 THE COURT: How long do you think it's going to
3 require you for you to look at the --

4 MR. ZEIDENBURG: I don't know that it will require
5 any time. I'd like to make an argument to you and then
6 depending on how that argument goes we could discuss, you know,
7 whether I need to review the record.

8 THE COURT: Sure. Go ahead.

9 MR. ZEIDENBERG: Judge, we received the presentence
10 report in the middle of July and we had ten days in which to
11 file objections. And on July 29th we filed our objections
12 explaining exactly why we thought these calculations were
13 incorrect. And you have -- we have articulated it for you and
14 you see it and we reiterate those arguments in our presentence
15 report.

16 The presentence report writer got our objections and
17 he said that he will amend the PSR to show the drug
18 calculations in detail. He stated -- and then he said later in
19 his response, "As stated earlier, this officer will insert a
20 more in-depth explanation about the conversion process for the
21 drug weight analysis in the report."

22 Now, he never provided us anything or the court as
23 far as we know. There has been no amended PSR report. There's
24 been no in-depth finding and then here we are walking into
25 court at 2:00 pm on the sentencing date of five weeks or

1 whatever. The end of July, all of August go by, all of
2 September, so two months later we walk into court and we have a
3 case agent say, "Well, I have five pages of handwritten notes
4 which backs this up."

5 Well, it's a little late in the game. I'm sure the
6 agent -- I take him at his word that he would have answered any
7 questions that we had for him. I don't doubt that for a
8 second, but you put yourselves in our shoes. How are we
9 supposed to know that we're supposed to figure out that there's
10 a DEA agent out there somewhere who's got five pages of
11 handwritten notes on which Mr. Wood is relying on to write his
12 presentence report?

13 Mr. Woods says he's going to be sending us an amended
14 report. We were waiting and once we got that, you can bet we
15 would have poured over it carefully to see that this was done
16 correctly. I frankly think it's somewhat of a, you know, an
17 eleventh hour type ambush when you walk into court and you're
18 handed this stuff and now we're supposed to -- supposed to
19 zealously represent Dr. McIver and make arguments to the court.

20 I don't know if these calculations are correct. I
21 mean, again, I'm not questioning the agent's good faith for a
22 second. I -- he got a call yesterday, I'm sure, at his office
23 and said, "Come down to Spartanburg, dig up your notes from
24 five years ago. And we're going to -- you know, I'm going to
25 throw you on the stand and ask you some questions," but what

1 kind of notice is that? What is this whole process you started
2 and it's supposed to be an orderly process where the objections
3 are noted, everyone's positions are clear on the record and
4 then we can then make an oral argument to your Honor.

5 THE COURT: I don't think you can sit on your hands
6 and if you -- if it wasn't forthcoming, you should have either
7 contacted the court or contacted the government as to why.
8 Where is the stuff? Now, I'll be glad to let you come back
9 another day and give you plenty of time to do the calculations
10 and check them.

11 MR. ZEIDENBERG: Well, Judge, you know, I've got a
12 client who is dying and coming back another day, you know,
13 weeks from now or a month from now --

14 THE COURT: No, I'm not talking -- I'm not talking
15 about weeks from now. I'll take care of you next week. I'll
16 take care of you tomorrow if you can to do the calculations
17 overnight.

18 MR. ZEIDENBERG: Well, look, I'll take a look at
19 those calculations if we could have a recess.

20 THE COURT: Sure.

21 MR. ZEIDENBURG: And we'll take a look at them. I
22 mean, I wanted -- you know, we wanted -- Mr. McIver's family
23 has come in. His friends have come in and we've flown in, you
24 know, for this hearing, so obviously that's why when we get a
25 note, a response that's filed with the court saying that

1 there's going to be an addendum filed, I don't think it's
2 incumbent upon the defense to encourage the probation writer to
3 do his job and to do what he says he's going to do.

4 I don't know why. Maybe he's decided that we are
5 right for all I know. Maybe he decided that he's got other
6 things that are more important on his agenda. I don't know.
7 But just as if -- if ten days had gone by and we hadn't filed
8 any objections to that presentence report, I don't imagine Mr.
9 Woods would have called us up and said, "You're very close to
10 your ten days, counselor. You need to file something."

11 THE COURT: No. The way it works down here is if you
12 can't meet the deadline, you would ask the court for an
13 extension and you always get it.

14 MR. ZEIDENBERG: Well, then I think it would have
15 been incumbent upon the probation reporter to say we haven't
16 met -- I can't meet the deadline. We met our deadlines.

17 THE COURT: We'll take a short recess and let you
18 look at the numbers. You can make him available, both y'all
19 available.

20 (Brief recess at 2:30 pm, then reconvened at
21 2:40 pm.)

22 THE COURT: Are we happy now? There was an ECF
23 filing on August the 5th, 2010, contains the calculations. The
24 amended -- it's the amended one that showed the calculations
25 beginning at paragraph 40.

1 MR. ZEIDENBERG: Well, let's put it this way, Judge,
2 I wouldn't go so far as to say we're happy, but we do withdraw
3 the objection and just so the court and Mr. Woods understands
4 the issue from the gov -- keep saying the government, Judge. I
5 was a prosecutor for many years. It's a really hard habit to
6 break.

7 Notwithstanding that Mr. Woods did file an amended
8 presentence report, our issue with it -- and this is somewhat
9 academic just so the court understands -- is that even in this
10 one it didn't explain what the case agent just did explain,
11 which is where and how he did those calculations. But given
12 that he has now said that, we have had an opportunity briefly
13 to sit down with him and to review his -- you know, what the
14 basis is, that there's an index and what not, that's
15 information that frankly was new to me. I didn't know that and
16 it isn't reflected here. So given those -- given that
17 information, we are ready to proceed with the --

18 THE COURT: So you're withdrawing the objection?

19 MR. ZEIDENBURG: We will, your Honor.

20 THE COURT: All right. Then I would adopt the
21 guideline provisions as previously stated for purposes of
22 determining the reasonableness of my sentence. I would also
23 adopt the factual findings in the presentence report as a basis
24 in part to support the 3553(a) factors.

25 Mr. Watkins.

1 MR. WATKINS: May it please the court, your Honor.
2 Regarding the 3553(a) factors, the government believes that a
3 guideline sentence in this case is an appropriate sentence.
4 Your Honor is very familiar with this case, but nonetheless I
5 just want to run through a couple of factors why we believe
6 that the guideline calculation as reflected and the Sentencing
7 Commission's work is appropriate.

8 First, your Honor, the nature and circumstances of
9 the offense. As your Honor knows from your daily work in this
10 court, we have a number of pill cases that have been prosecuted
11 throughout the upstate of South Carolina. A number of
12 individuals sadly are addicted to these painkillers and this
13 has ruined many lives. This is a problem here in the upstate
14 of South Carolina.

15 Something that enables this illicit trade in drugs
16 are physicians like Dr. McIver, who frankly in street terms are
17 the candy man, enabling these pills to be sold by addicts,
18 passed back and forth, continuing the cycle of addiction, your
19 Honor. This is a very serious matter to the United States and
20 the government believes that the circumstances of this offense
21 as outlined in the trial testimony and recorded in the opinion
22 of the United States Court of Appeals for the Fourth Circuit
23 are egregious. The government believes that a guideline
24 sentence --

25 THE COURT: Mr. Watkins --

1 MR. WATKINS: Yes, sir.

2 THE COURT: -- what do you do with the argument that
3 really Mr. McIver was convicted of will -- on the basis of
4 willful blindness and not like a pain doctor out there making
5 lots of money and selling -- and illicitly selling drugs. In
6 other words, the guideline provision looks to me like that it's
7 designed for those people who are doing this who are -- who are
8 -- who are intentionally doing it and not willfully and blindly
9 doing it.

10 MR. WATKINS: Your Honor, I think by turning a blind
11 eye when you have individuals coming in and simply subjectively
12 complaining of foot pain or wrist pain, no X-rays being done,
13 track marks on the arms and just prescribing massive doses of
14 the drug, that's really -- your Honor, I think when we look at
15 the totality of the drug problem, no different than someone
16 just coming in saying, "Hey, I'd like some Roxi. I'd like a
17 little bit of oxy," and a physician prescribing. He did a bare
18 minimum to thwart that. So I do believe this guideline is
19 appropriate and that we have a lot of unfortunately willful
20 blindness going on in the physician community, as I -- as I
21 know your Honor has a pill sentencing again next week in a
22 conspiracy case.

23 And there's -- essentially there's two ways for these
24 conspiracies to get their pills. One is to obtain fraudulent
25 prescriptions; two, is with the assistance of physicians like

1 Dr. McIver in working as the role of the candy man and putting
2 all this weight out there to be used. Therefore, your Honor,
3 the government does not believe that the willful blindness
4 enures to his benefit.

5 THE COURT: Well, I'm only aware of two doctors being
6 prosecuted in this district, one I think Judge Houck tried and
7 I tried the other one. That's all I'm aware of. There might
8 have been some others that I'm not aware of.

9 MR. WATKINS: And, your Honor, I think that is
10 indicative that the government and DEA, we need to focus our
11 resources stopping doctors like that rather than the low-level
12 conspirators. I would agree with that and as a prosecutor I
13 can say I'm affirmatively trying to do that in my case load.

14 THE COURT: All right. Go ahead with your argument.

15 MR. WATKINS: Yes, sir. Your Honor, we believe the
16 guideline sentence would also promote respect for our drug laws
17 and provide a just punishment for this offense. It would also
18 deter this defendant from any further criminal conduct. I
19 understand there's going to be an argument made for a variance
20 regarding his health and, your Honor, the Federal Bureau of
21 Prisons can certainly provide him medical care. Butner is a
22 very fine facility and I think a guideline sentence would
23 enable him to get the care he needs. For those factors, your
24 Honor, the government asks this court to impose a guideline
25 sentence.

1 THE COURT: Well, in terms of deterring him, he
2 doesn't have a license any more, so how can he -- how can he do
3 this again?

4 MR. WATKINS: Your Honor, it would deter him from
5 becoming involved in any sort of organization where he would be
6 involved in writing -- forging prescriptions, working with
7 these drug rings, supplying them in any way, giving them
8 information about other sources of pills. He still could be
9 involved in criminal activity and, therefore, the government
10 still believes a guideline sentence would provide deterrence.

11 THE COURT: Anything else?

12 MR. WATKINS: No, sir.

13 THE COURT: Mr. Zeidenberg.

14 MR. ZEIDENBERG: Thank you, your Honor. Your Honor,
15 I'm sure that the court has already read and I can tell from
16 the questions that the court has read our submission and I'm
17 sure seen the letter from Dr. Eisenberger regarding Dr.
18 McIver's health. And as I told Dr. McIver when I sent those
19 records to this expert at Johns Hopkins, I said, "You
20 understand that bad news from Dr. Eisenberger could be
21 helpful." But -- "to your sentencing."

22 But notwithstanding that, Judge, getting that letter
23 certainly, you know, was like a fist at the pit of your stomach
24 when you read that. When you read the prognosis for Dr.
25 McIver, it is exceedingly grim. The man is -- I mean, I hate

1 to say these things in front of him, because, you know, I can't
2 imagine hearing those words if I were sitting in his seat, but
3 the prognosis is what it is and it's extremely grim.

4 And we've included in our materials, you know,
5 probably a dozen, if not more cases in which courts have found
6 in situations where defendants had much less dire prognosis and
7 notwithstanding the statements by the Bureau of Prisons that
8 they have the facilities and they have the -- their ability to
9 treat, the guidelines specifically address this type of
10 situation and certainly you can't find a case, I don't think,
11 in which more fairly fits within 5H1.4.

12 THE COURT: What puzzles me is about two years ago
13 you indicated to my office that you were going to the BOP to
14 apply for a mercy release. Why didn't you do it?

15 MR. ZEIDENBERG: Judge, you know, part of that may
16 have been our own -- you know, we may have been remiss. We did
17 do some preliminary research. I've got tell you in my -- and
18 this may sound self-serving. It is almost impossible -- I'm
19 new to the defense bar. I'm not -- you know, I don't -- you
20 know, I was a prosecutor. I never had these issues in trying
21 to get in touch with a client who's incarcerated. I've never
22 had a client who's incarcerated.

23 THE COURT: Where did you prosecute?

24 MR. ZEIDENBURG: I was a federal prosecutor in the
25 District of Columbia in the Department of Justice for 17 years.

1 And so, you know, I joined a big firm and we took this case on
2 pro bono, but I don't do criminal defense work, so the
3 mechanics of this were new to me. But, I mean, it -- he was
4 held basically incommunicado as far as I'm concerned down at
5 Butner. I mean, I would call there. I would call there. I
6 would write letters there. I could not speak with the man. I
7 don't think I even had a phone conversation with Dr. McIver
8 until about two months ago.

9 And even then it's just -- I mean, I don't want to
10 waste your time explaining about my hard life trying to get in
11 touch with him, but I couldn't communicate with him. I
12 couldn't get down there to visit him. That's why we had to get
13 a continuance because they don't respond to my phone calls. I
14 said, "Am I on the list?" That's all I wanted to know. Am I
15 on the visitor list, because I didn't wanted to fly down here
16 and then them say, "You know, you didn't make the proper
17 arrangement."

18 So part of the problem, Judge, was I didn't know what
19 his condition was. I knew that he had prostate cancer, but,
20 you know, let's face it, there's all kinds of prostate cancer.
21 You know, that generally can be fairly manageable and
22 treatable. I mean, it's serious obviously. It's cancer, but
23 some people have cancer of the prostate and live for many
24 years.

25 And it wasn't until more recently that I learned that

1 it -- I think from his daughters, as I recall, that it had
2 spread and that it was, you know, metastatic cancer. And, you
3 know, we had also done some other research into this
4 compassionate release and frankly, as I recall, it didn't look
5 like a very easy road to hoe.

6 And so at that point when we saw, I think, some of
7 hurdles that we had to face because, you know, he wasn't on his
8 -- he wasn't on death's door at that time, literally, you know,
9 going to be dying imminently within a week, a month, whatever
10 it was, and we had our pending motion, you know, we made the
11 judgment to let's see --

12 THE COURT: Well, I mean he was diagnosed with
13 metastatic prostate cancer in February of 2009.

14 MR. ZEIDENBERG: That's correct, but I don't think I
15 learned about it. I don't remember when I would have learned
16 about it and I advised the court of it over the summer, I think
17 the summer of 2009 I think I told the court. And, you know,
18 you know, whether it was a question of strategy, I can't really
19 tell you, Judge, what our thinking was except that I thought,
20 as looking back and trying to recreate my thoughts was that I
21 thought from either -- either I looked at it or had an
22 associate look at it, that it was a tough road to hoe in
23 getting out on compassionate release, that the standard was
24 pretty high and I wasn't confident.

25 And come to think of it, Judge, as I recall, it had

1 to be done through the institution and I had no luck getting in
2 communication with that institution. I've written letters to
3 the warden there trying to get communications to my client.
4 He's never got a copy of our presentence report, the report
5 that you have there, you know, our memorandum which I mailed to
6 him ten days ago. He never saw it until about an hour ago.
7 It's -- they won't give it to him. He's being held 23 and a
8 half hours a day in isolation, a SHU, Special Housing Unit, 23
9 and a half hours a day just like, you know, one of the
10 terrorists at super max in Florence, Colorado.

11 THE COURT: What's the reason why he's in there,
12 because, you know, it perplexes me in that we've got letters
13 from prisoners who had contact with him, so how would they have
14 contact with him if he's up --

15 MR. ZEIDENBURG: Well, it's been about the last two
16 months that he's been in SHU. It's not for disciplinary
17 reasons, but I don't know. They say it's administrative
18 reasons, you know, housing and space reasons. I don't know.
19 Again, I can't get an explanation. You're obviously right he
20 was -- he was not in the SHU, you know, for the majority of the
21 time, but for the last two months he has been. And you can
22 imagine even if you're a healthy man, what it must be like to
23 be in there. There's no light. They don't -- they don't give
24 a clock on the wall. You don't know whether it's daytime or
25 nighttime. They pass your food right through a slot in the

1 wall.

2 And so, you know, whether I was remiss in not
3 pursuing that I may well have been. Certainly it's something
4 if we're not successful here that we would have to contemplate
5 pursuing and I would, but I tell you it's a bureaucratic morass
6 over there and they're not just responsive to say the least.

7 But, your Honor, when you look at the cases that are
8 out there where people suffering from either similar or much
9 less serious -- you know, there's people with a whole spectrum
10 of various ailments, you know, diabetes and they've got heart
11 disease and I've got gout and I've got these different
12 conditions, a whole constellation of different symptoms, and
13 the courts have found in some of those cases -- in many of
14 those cases where even when they had sentence ranges, you know,
15 150 months, 140 months, guideline ranges higher than Dr.
16 McIver, the court has gone all the way down to a low enough
17 level that the defendant can go home. And there's cases also
18 we cite in there where that has been upheld. It's a
19 discretionary call.

20 And, your Honor, it's a question of compassion. It's
21 a question of whether, you know, the man can spend the last
22 year or so of his life, which is what Dr. Eisenberger says that
23 he has, with his family or in the SHU and then being traipsed
24 around to various -- his various infirmaries at the -- at
25 Butner. And for -- for this statute, this guidelines

1 provision, 5H1.4, we submit is designed for someone like Dr.
2 McIver.

3 And if I may, your Honor, I'd like to just continue
4 on because it's all part of that argument which, as the court's
5 found, that the guideline range -- the proper guideline range
6 is 32 and we've withdrawn our objection to that, but it's very
7 important, as I'm sure the court knows, that there is no
8 presumption that that guideline sentence that results from that
9 finding, the 121 months, is reasonable. There is no
10 presumption of reasonableness.

11 And there isn't a need for an extraordinary reason to
12 divert from that sentence and 3553 requires that the court
13 impose a sentence that is sufficient, but not greater than
14 necessary to provide for just punishment and 121 months is more
15 than what is sufficient. It is more than what's sufficient.

16 And the guidelines under 3553 talk about four
17 factors. I just want to touch them -- on those briefly, your
18 Honor. One of them has to do -- I'll take them in reverse
19 order -- has to do with providing the defendant with training
20 and medical care or other treatment. That's not applicable to
21 this case.

22 And the third has to do with protecting the public
23 from the defendant. And your Honor's questions to the
24 prosecutor were exactly right. The public does not fear --
25 there is not a defendant, I submit, that the court could find

1 would be less of a threat to the public. He went through an
2 entire life without any brushes with the law. He abused his
3 prescription pad. It's been taken from him legally. He has no
4 access to it. I mean, the thought that he would be involved in
5 some kind of drug ring, I mean, look at the man. He's 66 years
6 old now and he's dying of prostate cancer and for now for the
7 first time in his life he's going to get engaged in some kind
8 of a drug conspiracy with people out on the street. I don't
9 think that that's a credible threat.

10 The third point, your Honor, is deterrence and
11 whether the sentence imposed if you gave him time served would
12 be sufficient deterrence, and I submit that it would. You have
13 to consider, your Honor, the cohort of Dr. McIver, because I
14 don't think -- and what the guidelines does unfortunately in
15 those calculations that the agent took us through, are
16 guidelines that would apply to any drug dealer anywhere in the
17 United States that was plying his trade.

18 And in some way you say that's fine, everyone should
19 be treated the same. Well, that sounds great in theory, but in
20 practice you have to look at the realities. I mean, there are
21 certain people who are engaged in criminal enterprises who that
22 is their life. That is their lifestyle and to deter them is
23 going to require a different level of a pain threshold, if you
24 will, than a professional doctor or an attorney or any
25 professional. And that's -- that's just reality.

1 And to think that other physicians wouldn't look at
2 what's happened to Dr. McIver and be scared out of their mind
3 because he's gotten 66 months in jail and not 121 months is
4 simply wrong, I think. I mean, there isn't anyone, any
5 physician that could look at what happened to him and think,
6 you know what, I'll take that risk. It doesn't look that bad
7 to me.

8 He has lost everything. He lost his profession. He
9 lost his home. His family was made destitute. He's dying of
10 cancer. His mother died while he was incarcerated. He
11 couldn't go to that funeral. His daughter was married. He
12 couldn't go to that wedding. His -- his young daughter, who is
13 eleven years old, is now almost out of her teens. He missed
14 that entire period of her life. I mean, you can't look at
15 what's happened to him and think, well, it's really not
16 sufficient, that people look -- will look at this and think
17 it's worth the risk. I simply don't think that's true.

18 And, Judge, I think you can imagine -- we can all
19 imagine as attorneys -- and I've seen this so far in my white
20 collar practice -- the threat to a defendant who is an
21 attorney, the fear that any type of conviction of any type
22 which will cause him to lose his bar license is an
23 excruciatingly high penalty and appropriate one perhaps. I'm
24 not disputing that, but one that you can't look at in
25 isolation, and yet the guidelines does. The guidelines don't

1 take that into consideration when they look at that sentence.

2 And, your Honor, as to facts of the case that the
3 prosecutor was recounting and in particular in response to your
4 question about willful blindness, the prosecutor's exactly
5 right in terms of willful blindness does constitute legal
6 guilt. There's no question about that, that the jury had a
7 basis and the court could properly put that theory, the
8 government could argue it, the jury could find it, but to say
9 that it's legally the same, legal guilt -- willful blindness
10 legally is the equivalent of intentional knowing -- knowing
11 intentional act that's done deliberately as opposed to just
12 turning a blind eye to it. Legally they're the same. Morally
13 they're not. Morally they're not.

14 And the court would certainly be justified and I
15 would expect that it would punish more severely the doctor in a
16 situation where a patient came in and said, "Doc, I'd like a
17 thousand milligrams of oxycodone please and make it snappy. I
18 have -- you know, I've got to be -- I'm meeting a guy down the
19 street. He wants to -- I want sell them."

20 Now, that individual made that doctor, that
21 hypothetical doctor may be just as guilty as one who turns his
22 blind eye and ignores all the warning signs that were out
23 there, but morally in terms of what your Honor would do to
24 those two defendants I would think there would be and there
25 should be a difference in the type of sentence they get and I

1 think that there is no accounting for that in this guideline
2 that we have before us. You have 121 months and there is no
3 distinction.

4 Judge, I would also like the court to seriously
5 consider before imposing sentence the letters that you saw and
6 I know -- I know you did read them, because I --

7 THE COURT: I found one of them very interesting.

8 MR. ZEIDENBURG: I'm sorry?

9 THE COURT: I found one of them really interesting.

10 MR. ZEIDENBURG: Which is that, your honor?

11 THE COURT: From his daughter that says that he
12 doesn't want to take OxyContin any more, kind ironic, but I
13 read them all.

14 MR. ZEIDENBURG: It is. Your Honor, the letters from
15 his fellow inmates, you know, I think that -- I can't imagine
16 what it was like being in Dr. McIver's shoes. I think about
17 it, you know, someone who's a professional. It's easier for
18 all of us to, I think, identify with someone who's a
19 professional because we are, and so it's easier to imagine
20 being in that predicament that he found himself in from his own
21 actions. There's no denying that he is -- he acknowledges and
22 he will tell you that he knows he has done wrong and he's here
23 because of his own conduct. He knows that.

24 But notwithstanding the despair and the anger that
25 one must feel to be locked away at this age and be way from

1 your family and to be able to put that aside and make a
2 conscious decision of you know what, I'm going to try and help
3 my fellow inmates, I'm going to try and not whine about my
4 situation here, I'm going to try and be constructive, try to be
5 positive and try to help people, and that he was actually able
6 to.

7 And I've spoken to several of these inmates, some of
8 whom have been released. The individual who's learned Swedish
9 from Dr. McIver whose wife is Swedish now, he can communicate
10 to her. You know, he couldn't go on long enough about how much
11 that had meant to him, that relationship and the fact that he
12 spent the time to help him.

13 And I think that that -- those are good works, Judge.
14 I mean, I think it says something about the measure of a man
15 and the character of a person that there's something in there
16 that's redeemable and that it should be taken into
17 consideration in sentencing, just as if he has been nothing but
18 trouble in the institution, that could be taken into
19 consideration.

20 You know, I tried to get his work records from --
21 from Butner. I wrote three or four letters to them asking them
22 for them and, of course, they just ignored my letters, but, you
23 know, going back to the very first point we were making about
24 Butner says they can take care of him, here's an institution
25 that doesn't give him his mail from his attorneys, doesn't

1 respond to his attorney's request for records. I told them I
2 needed it for his sentencing hearing. I did this a month and a
3 half ago and we get nothing.

4 It's very disconcerting to think that when they say,
5 "We've got it covered. Don't worry. We'll take good care of
6 him," I don't have any confidence in that. I mean, I'm sure
7 that they're well-meaning people there that work there. I have
8 no doubt about that, but as an institution I don't think the
9 court can have any confidence that his medical needs are going
10 to be addressed.

11 THE COURT: How did you get the medical records from
12 Butner from the doctor?

13 MR. ZEIDENBERG: Judge, it was a real struggle, but
14 we eventually got them obviously, but that took -- that took
15 months. It took months and we eventually got them, but we had
16 to go through their legal department and finally they, you
17 know, they did it, but, you know, it's a battle. It would be
18 one of those things you have on your to-do list every day, call
19 Butner. You do your calls and you call them and then you wait
20 for the next day and call them again and they never called
21 back.

22 Your Honor, the bottom line is, as I think I've
23 touched on the main points, I wanted to make -- certainly make
24 them in our pleadings, and I know Dr. McIver would like to make
25 a brief statement to the court with the court's permission,

1 that his punishment thus far, 66 months, has been sufficient.
2 It has been sufficient. He has paid an enormous price.

3 And that the court is not -- has been instructed by
4 the Supreme Court this court shouldn't and district court
5 judges should not presume the reasonableness of those guideline
6 sentences. It's just a starting point. It's just a starting
7 point and then you have to look at all the 3553 factors and
8 decide whether it's appropriate, but it doesn't take an
9 extraordinary reason to depart from that downwards.

10 And in this case, in fact, I would submit there were
11 and there are extraordinary reasons, his health; that the
12 underlying facts of the case which I think take it out of the
13 heartland of doctor/pill cases, it's not a typical case; the
14 fact there was willful blindness; and the amount he has already
15 had to suffer, losing his home, his family being made
16 destitute.

17 It's -- it's an awful, awful thing, I can only
18 imagine, being helpless and unable to assist your loved ones.
19 His wife wasn't even -- couldn't even get here today because
20 she doesn't have gas money. She doesn't have money for stamps.
21 So, I mean, they are extremely destitute, made that way because
22 of Dr. McIver's own actions, which he has to take
23 responsibility for and that he will take to his grave.

24 But this is not an individual, unlike some I'm sure
25 the court has seen, I know I have seen, who don't seem to care

1 about the repercussions of their own conduct. Dr. McIver does,
2 and unfortunately those are the people that really pay the
3 highest price because they know they've done wrong. They're
4 suffering because of what they've done to others.

5 THE COURT: How is he going to be cared for if
6 they're so destitute?

7 MR. ZEIDENBURG: I'm sorry?

8 THE COURT: How is he going to be cared for?

9 MR. ZEIDENBURG: Your Honor, that's a -- that's a
10 good question. I am hopeful, given his age, and I'm not any
11 expert, but I believe that his social security and/or Medicaid,
12 he should have benefits under both, I would think.

13 THE COURT: Well, he probably will, but that's going
14 to take time.

15 MR. ZEIDENBURG: His daughter -- his daughter is here
16 -- both his daughters are here and they have been extremely
17 supportive of him. They I have spoken to repeatedly over the
18 course of this engagement and, you know, I think it will be
19 difficult for the family, but I know Dr. McIver has told me and
20 I'm sure he will tell you that his intention, at least at this
21 point, to go out get a job. And he knows he's not going to be
22 working as a physician, but as told me, you know, he'll take a
23 job as a greeter at Wal-Mart. He'll do whatever he can, any
24 minimum wage job on up that he can possibly do, and there are
25 jobs he probably can do. I'm sure that there are people who

1 need tutoring, that he could become a paid tutor to help
2 students or what have you.

3 But it's certainly his wish and his family's wish and
4 I think a fair wish that his remaining time on this earth,
5 however short it may be, that it be done in the company of his
6 family and loved ones and that he permitted to live out what I
7 think will likely be a short remainder of his life with dignity
8 outside of the confines of Butner too where he's in a really --
9 really severe conditions.

10 THE COURT: Be glad to hear from Mr. McIver.

11 MR. WATKINS: Your Honor, can I respond to the
12 variance motion just briefly?

13 THE COURT: Yeah, let me hear from him so I keep it
14 together.

15 MR. WATKINS: Yes, sir.

16 THE COURT: Yes, sir. I'll be glad to hear from you.

17 THE DEFENDANT: Sir?

18 THE COURT: Be glad to hear from you.

19 THE DEFENDANT: Well, thank you. I certainly
20 appreciate your ruling on the 2255. I think that will
21 underscore people's faith in the judicial system. It also
22 affords me the opportunity to come to you today and have the
23 audacity to beg for another favor.

24 This has been quite an experience. I chose at the
25 very first to follow our family tradition and try to make the

1 best of a bad situation. I did that by considering prison
2 along the same lines as a monastery. If you think about it,
3 prison is kind of a yin to a monastery's yang in that both
4 they're unisex populations that are walled off from the rest of
5 the world from cares, troubles, responsibilities, duties, et
6 cetera and temptations. Everything is provided for the members
7 without our really having to lift a finger. We get everything,
8 all basic needs. And there's lots of time for study and
9 learning and contemplation and service.

10 So using this monastic paradigm I threw myself into
11 that and I put a pretty rigorous educational curriculum
12 together, embarked on a return to my vigorous exercise program
13 of many years and threw myself into teaching as a service
14 opportunity. There really is a strange need to be of service,
15 which I think I hadn't recognized as such before, but it's
16 definitely there.

17 The -- those legs of that monastic paradigm were
18 fairly easy. The really tough part was the contemplation and
19 evaluation. I insisted that I be brutally honest, didn't want
20 to sometimes. It was very tempting to shy away from -- from
21 looking at the uglier faces of this creature called rotten.
22 And I found that my sins, crimes, transgressions were very
23 shameful, very diametrically opposed to my upbringing, my own
24 moral code and certainly the image I'd like to have of myself,
25 depressingly shameful.

1 And I just felt so much guilt and remorse and at
2 times self-loathing and I think if it hadn't been for the
3 support of my family and friends who not only forgave me, but
4 pointed out some good things, I would really have sunk into
5 despair, but I faced that and having faced it I can't imagine
6 with all that remorse and that shame and that pain ever being
7 tempted to do things like that again. I just -- I can't even
8 imagine it.

9 But the main reason I'm appealing to you, your Honor,
10 is that my wife has everything on her. We've always shared the
11 workload. She was weakened by illness and several years of
12 various tragedies that had preceded my legal problems. Even
13 when there were two of us working together, it was sometimes
14 overwhelming to do all the things that need to be done and
15 she's doing it all. I wasn't going to choke up. I just -- I'd
16 like to be there and give her a breather, just let her rest.
17 Appreciate you listening.

18 THE COURT: Thank you. Mr. Watkins.

19 MR. WATKINS: Your Honor, just very briefly, for the
20 record, regarding the variance motion the government would just
21 like the court to consider just one factor as well, that the
22 drug amount that he's being held responsibility for each of
23 these counts essentially represents one day of prescribing for
24 each of those patients. He was also found guilty of conspiracy
25 and the government has not objected to the guideline

1 calculation, however, if you look at that conduct through the
2 course of the conspiracy, the drug weight would have been
3 tremendous. And the government's position is he is getting a
4 substantial benefit by the way the writer calculated the
5 guidelines as it is and the government just wanted to put that
6 on the record before your Honor ruled.

7 THE COURT: Take a short break.

8 (Brief recess at 3:20 pm, then reconvened at
9 3:30 pm.)

10 THE COURT: All right. I'm aware that there is a
11 national struggle going on between the DEA and pain doctors and
12 I'm aware that people are watching cases around all over. I
13 think there have only been two tried in this district and their
14 efforts are important to solving a very serious problem, but
15 the -- this case should not be used as an example of sentencing
16 because there are factors that really causes me to
17 exceptionally individualize the sentence. And I don't think --
18 but the government got its conviction. It got -- it got
19 affirmed. I really didn't like finding Mr. Wise ineffective,
20 but that was in my mind the right decision.

21 I'm taking into account -- and what Mr. Watkins said,
22 he really just got tagged with a little bit, but again, in this
23 case it should not be measured as an example of how pain
24 doctors should be punished if they're convicted. So I've taken
25 into account the -- I frankly believe that Mr. -- and I use

1 that term Mr. because you're no longer a doctor -- that the
2 sentence that I will impose will protect the public from
3 further crimes in part because I just don't think he's
4 physically capable of committing any other crimes of this
5 nature.

6 I think he certainly has been deterred and in part
7 that's based on the fact that he cannot practice his profession
8 again, and so I've taken into account the extraordinary
9 physical impairment in this case. I'm convinced by the doctor
10 from Johns Hopkins that if I gave him 121 months, I might as
11 well give him life. If I gave him 80 months or 90 months, I
12 might as well give him life. So I'm not generally a light
13 sentencer, but I believe that he has served sufficiently an
14 amount of time to punish him sufficiently, but not greater than
15 -- than necessary, so I'm going to sentence him to a
16 time-served sentence.

17 He has 14 days in which to file any notice of intent
18 to appeal should he choose to do that. The government has
19 30 days. There will be an amended judgment entered up in
20 approximately 10 days or so reflecting that sentence.

21 Any questions?

22 And I also did look at the sentencing guidelines and
23 I'm granting -- it was implicit in what I said. I am granting
24 a variance primarily on the extraordinary physical impairment
25 that I believe exists.

1 So any questions?

2 MR. WATKINS: Nothing from the government, your
3 Honor.

4 THE COURT: Thank you.

5 MR. ZEIDENBERG: Thank you, your Honor.

6 ***

7 I certify the foregoing is a correct transcript from the record
8 of proceedings in the above entitled matter.

9 S/Jean L. Cole, RMR 10/21/2010
10

11 _____
12 Jean L. Cole, RMR Date
13
14
15
16
17
18
19
20
21
22
23
24
25